LAI YEW SEONG

v.

CHAN KIM SANG

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
WAN SULEIMAN SCJ
GEORGE SEAH SCJ
[CIVIL APPEAL NO. 423 OF 1985]
8 NOVEMBER 1986

TORT: *Negligence - Appeal - Apportionment of liability - Contention that motor accident caused solely by negligence of respondent and that learned Judge wrong to find appellant also guilty of contributory negligence - Test of contributory negligence - Misdirection by Judge on both fact and law - Whether finding of apportionment should be set aside.*

This was an appeal limited to the apportionment of liability to the extent of one-third against the appellant and two thirds against the respondent. The contention of the appellant was that the motor accident was caused solely by the negligence of the respondent and that the learned Judge was wrong to find that the appellant was also guilty of contributory negligence.

Counsel for the appellant had submitted that on the facts adduced at the trial, the respondent/plaintiff had failed to establish on the balance of probabilities that the appellant/defendant was negligent.

Counsel for the appellant launched a four pronged attack on the judgment of the Court below. He then submitted that the learned Judge ought to have decided the suit based on the case put up by the respondent in the Court below. Having disbelieved the respondent's allegations that the appellant stopped his motor-car suddenly without any prior warnings whatsoever it was argued that the learned Judge ought to have dismissed the claim of the respondent based on the negligence of the appellant since the learned Judge apparently had accepted substantially the testimony of the appellant and his witness. It was further contended that until the respondent had established that the appellant was guilty of negligence there was no need for the learned Judge to consider the conduct of the appellant in dealing with the question of contributory negligence. It was submitted that the law on contributory negligence does not concern with the conduct of the defendant; it deals with the conduct of the plaintiff only.

Held:

[1] The expression "contributory negligence" applies mainly to the conduct of the plaintiff. The word "negligence" is not used in its usual meaning but it means the failure by a person to use reasonable care for the safety of himself or his property so that he becomes "the author of his own wrong".

[2] The test of contributory negligence is based entirely on the conduct of the plaintiff in that particular accident or case.

[3] The Court agreed with all the appellant's submissions and further held that *Ahmad Nordin's* case could be distinguished from the present case as the principal facts are different from that of the present case.

[4] Following *Chop Seng Heng v. Thevannasan & Ors.*, the learned Judge had misdirected himself both on the fact and the law when he was dealing with the respondent's case and contributory negligence.

[5] The learned Judge should have held that

(a) that the respondent was riding his motor-cycle without keeping any proper lookout;
(b) that he attempted to overtake the said motor-car on the right when it was unsafe to do so and
(c) that the cause of the accident was due entirely to his own negligence.

[6] In the event, their Lordships quashed the whole of the High Court Order and entered judgment in favour of the appellant and directed that the claim of the respondent against the appellant be dismissed.

[Appeal allowed with costs to appellant here and below to be taxed.]

Cases referred to:
Lewis v. Benye [1939] 1 KB 540
Bridge v. Grand Junction Ry [1838] ER 1134
R v. Southern Canadian Power Co. [1937] 3 All ER 923
Nance v. British Columbia Electric Ry [1951] AC 601
Brown & Lynn v. Western SMT Co. Ltd. [1945] SC 31
Ahmad Nordin bin Hj. Maslan & Anor. v. Eng Ngak & Ors. [1985] 2 MLJ 431
Ramoo v. Gan Soo Swee [1971] 1 MLJ 235
Chop Seng Heng v. Thevannasan & Ors. [1975] 2 MLJ 3

For the appellant - Mohd. Nor bin Mohamed of M/s. Wong Chooi & Mohd. Nor
For the respondent - R.K. Nathan of M/s. R.K. Nathan & Co.

JUDGMENT

George Seah SCJ:

This appeal is limited to the apportionment of liability to the extent of one-third against the appellant and two-thirds against the respondent. The contention of the appellant was that the motor accident was caused solely by the negligence of the respondent and the learned Judge was wrong to find that the appellant was also guilty of contributory negligence.

Like most motor accident claims there were conflicting versions and the learned Judge after hearing and seeing the plaintiff (respondent in this appeal) and the defendant (the appellant herein) made the following findings at pp. 3 and 4 of his Grounds of Judgment:

> I find from the evidence that the car did give trafficator light signal when it was just over one chain away from where it stopped. I found that there were two motor cycles behind the said car, one of the motor cycles eventually passed on the driver's left while the other knocked into the rear off-side of the said car. I found that the last time or the second time the driver looked into the rear-view mirror was when he was about 2 to 3 chains away from the place where he stopped and that he did not look into it again up to the moment of collision. I found that the car had stopped to let the oncoming lorry pass the car. I further found that the rider had decided to overtake the said car which was slowing down, and not that the driver had applied emergency brake in stopping suddenly, causing and forcing the rider to swerve to his right to overtake to avoid the collision.
>
> I found the rider negligent in overtaking without ensuring whether it was safe to do so, and that he should have seen the oncoming lorry too in view of the insignificant obstruction of the view in front caused by the small size of the said car which was a Toyota Corolla. He

> further failed to wait to ascertain first the intention of the driver who had switched on his trafficator light signal before deciding to overtake the said car. He was travelling too close to the said car. The next question was, as to whether the driver was himself guilty of any contributory negligence.

We would pause here to deal with the question of contributory negligence. Unless it is properly understood it is apt to be misleading. The expression "contributory negligence" applies mainly to the conduct of the plaintiff, du Parcq LJ in *Lewis v. Benye* [1939] 1 KB 540 @ 554 said:

> In order to establish the defence of contributory negligence, the defendant must prove, first that the plaintiff failed to take "ordinary care of himself" or, in other words, such care as a reasonable man would take for his own safety, and secondly, that his failure to take care was a contributory cause of the accident.

The amount of care which the plaintiff may reasonably be expected to take necessarily varies with the circumstances and with the conditions actually prevailing at the material time.

In addition, the word "negligence" is not used in its usual meaning. Negligence ordinarily means breach of a legal duty to take care, but as used in the expression "contributory negligence" it does not mean breach of duty. It means the failure by a person to use reasonable care for the safety of himself or his property, so that he becomes "the author of his own wrong" [see Parke B. in *Bridge v. Grand Junction Ry* [1838] ER 1134 and the judgment of Lord Maugham in *R v. Southern Canadian Power Co.* [1937] 3 All ER 923. More recently in *Nance v. British Columbia Electric Ry* [1951] AC 601 AC 611 Lord Simon said:

> When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed by his want of care, to his own injury. For when contributory negligence is set up a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.

The test of contributory of negligence, in our judgment, is based entirely on the conduct of the plaintiff in that particular accident or case but the learned Judge appeared to have misconstrued the law and applied it wrongly to that of the defendant. Be that as it may, learned Counsel had submitted that on the facts as adduced at the trial the respondent/plaintiff had failed to establish, on the balance of probabilities, that the appellant/defendant was negligent. Dealing with this aspect of the case the learned Judge had this to say at pp. 4 and 5 of his Grounds of Judgment:

> The driver knew that there were two motor cycles behind him, the nearer one was about 20 to 30 feet away; he wanted to turn right to go to a workshop and at the same time there was an oncoming lorry; in my view a potentially dangerous situation was being built up and the driver had to keep a very sharp look-out in the circumstances. Despite such situation, he only switched on the right trafficator light signal when he was just over one chain away and not earlier and in this connection, I accepted the passenger's evidence. I did not consider this sufficient warning or warning in time for the rider 20 to 30 feet behind.
>
> Further I found that the circumstances required him, at least, to look at the rear-view mirror once more before he stopped. Further, in view of such a critical situation being built up, I did not think that a conventional signal of trafficator light signal would be sufficient. Such a signal could indicate that the rider behind should be cautious rather than that the driver would be

stopping and that the rider should likewise stop, because there was no side road to the right (apart from, presumably a small dirt road, passage way or trodden path to the workshop), in other words, there was no real road junction or cross-roads. In the circumstances it was my considered view that merely switching on the trafficator light signal was not enough, but that an additional hand signal ought to have been given to avoid any confusion to vehicles following behind by indicating that the driver himself was stopping in the middle of the road.

Learned Counsel for the appellant launched a four-pronged attack on this part of the judgment of the Court. Firstly, it was submitted that this finding was contrary to the case which the respondent attempted to prove in the Court below. According to the respondent, he had been following the said motor-car for some distance and to quote his words:

> The car in front stopped suddenly without any indication. I did not know which direction this car wanted to go. Then I wanted to overtake this car from the right and I tried to swerve back to the left (because of the oncoming lorry) but couldn't control it and then the accident took place ... When the car braked to stop, I did not see any brake light or tail light from the car ...

The respondent's version of how the accident happened was totally rejected by the learned Judge.

Secondly, it was contended that observations on the general duty of the driver of a motor vehicle which is following another vehicle have been made in many reported cases. We need only cite one made by Lord Justice-Clerk Cooper in *Brown & Lynn v. Western SMT Co. Ltd.* [1945] SC 31:

> The conduct of the leading driver will, of course, have an important bearing upon liability for an accident in every case in which the conduct of both drivers is put in issue, either by a plea of contributory negligence or by double allegations of fault. But the duty of the following driver is a continuous duty which persists independently of any actual emergency or of the leading driver's reaction to such emergency, and the question whether the following driver has failed in his duty cannot depend upon whether the leading driver has fulfilled his ...
>
> The distance which should separate two vehicles travelling one behind the other must depend upon many variable factors - their speed, the nature of the locality, the other traffic present or to be expected, the opportunity available to the following driver of commanding a view ahead of the leading vehicle, the distance within which the following vehicle can be pulled up, and many other things. The following driver is, in my view, bound, so far as reasonably possible, to take up such a position, and to drive in such a fashion, as will enable him to deal successfully with all traffic exigencies reasonably to be anticipated; but whether he has fulfilled this duty must in every case be a question of fact, just as it is a question of fact whether, on any emergency disclosing itself, the following driver acted with the alertness, skill and judgment reasonably to be expected in the circumstances ...

It was submitted (rightly in our opinion) that the learned Judge had failed to take this matter into account and his failure to do so had materially affected the appellant's case and defence against the allegations of the respondent that he was negligent in the handling of his motor-car at the time of the accident.

Thirdly, it was said by learned Counsel for the appellant that although passing reference was made to the two motor cyclists who had been following the said motor-car for sometime and that the nearer one was about 20 to 30 feet away, the learned Judge did not appear to take into consideration that this motor cyclist managed to pass him safely on the left and why he did so instead of on the right. It was submitted and we agree with his submission, that a reasonable reference to be drawn from this fact was that this particular motor cyclist

(who was riding ahead of the respondent) had been keeping a proper lookout and saw the oncoming lorry approaching from the opposite direction on the other side of the road, while the respondent who was riding behind the motor cyclist had apparently failed to do so.

Lastly, learned Counsel for the appellant had contended that the learned Judge was wrong to rely on the Supreme Court case of *Ahmad Nordin bin Hj. Maslan & Anor. v. Eng Ngak & Ors.* [1985] 2 MLJ 431 to support his view that "merely switching on the trafficator light signal was not enough, but that an additional hand signal ought to have been given to avoid any confusion to vehicles following behind by indicating that the driver himself was stopping in the middle of the road". In our opinion, *Ahmad Nordin* case does not lay down such a proposition and the principal facts are different from that of the present case. There while travelling along a straight stretch of unlit country road on a dark night the lights of the lorry fully laden with padi suddenly went off and its engine also stalled thereby compelling the driver to park his lorry in the middle of his side of the road with the near-side front and rear tyres about 8 inches away from the left edge of the road and the off-side front and rear tyres about 6 inches from the centre white line. Apart from a triangular reflector placed some 150 feet behind the parked lorry no lights were placed at the rear of the stationary lorry to warn approaching vehicles of its position on the road. A motor-car crashed into the rear of the stationary lorry resulting in the death of the front-seat passenger and injuries to the driver and the rear-seat passengers. On these facts, the Supreme Court held that the mere placing of a triangular reflector by itself was insufficient to forewarn any vehicle of the danger that lies ahead in the darkness having regard to the provision contained in paragraph 42 of the Highway Code relating to the need to display an emergency light when the lights of the vehicle fails. Here, the accident happened in broad daylight and fine weather. *Ahmad Nordin* case can therefore be distinguished from the present case. There was no dispute about visibility and there was nothing to obstruct the view of the respondent that lay in front of him. His main complaint against the appellant was that he stopped his motor-car suddenly in the middle of the road without giving any prior trafficator light signal of his intention to turn to the right. This allegation was rejected by the learned Judge. It was not the case of the respondent in the Court below that if the appellant had given a hand signal indicating his intention to stop, he could have avoided the accident. The short answer to this is that if the first motor cyclist, who was riding slightly ahead of the respondent, could pass the motor-car safely on the left why the respondent, who was riding behind him, could not do so?

Learned Counsel for the appellant then submitted that the learned Judge ought to have decided the suit based on the case put up by the respondent in the Court below. Having disbelieved the respondent's allegations that the appellant stopped his motor-car suddenly without any prior warnings whatsoever, it was argued that the learned Judge ought to have dismissed the claim of the respondent based on the negligence of the appellant, since the learned Judge apparently had accepted substantially the testimony of the appellant and his witness. It was further contended that until the respondent had established the appellant was guilty of negligence there was no need for the learned substantially the testimony of the appellant and his witness. It was further contended that until the respondent had established the appellant was guilty of negligence there was no need for the learned Judge to consider the conduct of the appellant in dealing with the question of contributory negligence. Learned Counsel submitted that the law on contributory negligence does not concern with the conduct of the defendant; it deals with the conduct of the plaintiff only. We agree with all these submissions.

In *Ramoo v. Gan Soo Swee* [1971] 1 MLJ 235 @ 239 Lord Cross in giving the judgment of the Privy Council said:

> Their Lordships are not sure that had they been trying the case they would in all circumstances have attributed so much of the blame to the lorry driver but it is only in exceptional circumstances that an appellate Court is justified in interfering with an apportionment of liability made by the trial Judge [see *The Macgregor* [1943] AC 197] and such circumstances do not exist here.
>
> Accordingly their Lordships direct that the judgment of the Federal Court be set aside and that of Buttrose J. restored and that the respondents pay the costs incurred by the appellant before the Federal Court and their appeal to the Board.

In the High Court, Buttrose J found that the traffic lights were defective but held that the respective taxi and lorry drivers were aware of this. He apportioned the blame at 75% on the lorry driver and 25% on the taxi driver.

The Federal Court setting aside the finding of Buttrose J held that there was no evidence that either the driver of the lorry or the taxi knew that the traffic lights were defective and that in the circumstances the plaintiff had failed to prove that either or both the drivers were negligent.

Dealing with an appeal on apportionment in the case of *Chop Seng Heng v. Thevannasan & Ors.* [1975]2 MLJ 3 @ 6 Lord Edmund-Davies said:

> Submissions that the trial Judge misdirected himself when apportioning the blame as he did are in their Lordships's judgment, ill-founded. This case is accordingly, unlike *Kerry v.Carter* [1969] 1 WLR 1372, where, in a personal injuries case, the Court of Appeal interferred with the trial Judge's apportionment on the ground that he had substantially misdirected himself on matters of fact.
>
> There being no misdirection in the present case, whether or not their Lordships would have apportioned the blame in the manner as did the trial Judge is neither here no there. No error in principle has been established and, applying *The Macgregor* (*supra*) their Lordships would accordingly restore the 75:25 apportionment arrived at by Suffian FJ.

Applying this to the facts of the present case, it is plain that the learned Judge had misdirected himself both on the fact and the law when he was dealing with the respondent's case and contributory negligence. Based on his findings the learned Judge should have held that (a) that respondent was riding his motor-cycle without keeping any proper lookout, (b) that he attempted to overtake the said motor-car on the right when it was unsafe to do and (c) that the cause of the accident was due entirely to his own negligence. Not only would we set aside the apportionment of one-third blame attributed to the appellant and two-thirds to the respondent, we would also quash the whole of the Court Order and enter judgment in favour of the appellant and direct that the claim of the respondent against the appellant be dismissed. For the above reasons, the appeal is allowed with costs to the appellants here and below to be taxed. The deposit of RM500 to be refunded to the appellant forthwith.

Also found at [1987] 1 CLJ 351